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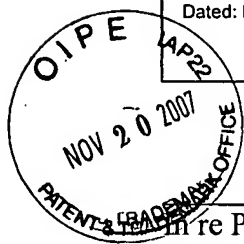
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Dated: November 20, 2007

Signature:

Jennifer Cioffi
(Jennifer Cioffi)

Docket No.: SMCY-P01-104
(PATENT)



IN THE UNITED STATES PATENT AND TRADEMARK OFFICE

In re Patent Application of:

Richard F. Gladney

Confirmation No.: 8016

Application No.: 10/671,903

Art Unit: 3673

Filed: September 26, 2003

Examiner: Sunil Singh

For: MATTRESS CENTER RIDGE
COMPENSATOR

REPLY BRIEF

MS Appeal Brief - Patents
Commissioner for Patents
P.O. Box 1450
Alexandria, VA 22313-1450

Dear Sir:

This Reply Brief is submitted in response to the Examiner's Answer mailed September 24, 2007, and in support of the appeal from the final rejection of Claims 1, 2, 4, 6-13, and 18-29 in the Final Office Action mailed July 25, 2006. Applicants previously filed a Pre-Appeal Brief and Notice of Appeal filed on October 27, 2006, and filed an Appeal Brief on June 11, 2007.

(i). **REAL PARTY OF INTEREST**

Appellants respectfully advise the Board that the real party in interest in the above-identified patent application is Dreamwell, Ltd., a limited liability company organized and existing under the laws of the State of Nevada, and having an office and place of business at 2325-B Renaissance Drive, Las Vegas, Nevada 89119, which is the assignee of this application

(ii). RELATED APPEALS AND INTERFERENCES

Appellants respectfully advise the Board that there are no other appeals or interferences known to appellants, their legal representative, or their assignee that will directly affect or be directly affected by or have a bearing on the Board's decision in the pending appeal.

(iii). STATUS OF CLAIMS

Claims 1, 2, 4, 6-13, and 18-22, 24-27, and 29 are now rejected in this application. Claims 3, 5, and 14-17 were previously canceled without prejudice. Claims 1, 2, 4, 6-13, and 18-29 are pending and on appeal. Claims 1, 2, 4, 6-13, and 18-29 were finally rejected in the Final Office Action dated July 25, 2006.

The Examiner has withdrawn the rejections of Claims 1, 2, 4, 6-13, and 18-29 under 35 U.S.C. 112, first paragraph in the Examiner's Answer, mailed on September 24, 2007. The Examiner has withdrawn the rejections of Claims 1, 2, 6, 9, and 18-28 under 35 U.S.C. 102(b) in the Examiner's Answer. The Examiner has withdrawn the rejections of Claims 4 and 29 under 35 U.S.C. 103(a) in the Examiner's Answer. Independent Claim 23 and dependent Claim 28 now have no associated rejections.

Claims 1, 18, 20, 21, and 23 are independent claims; all other pending claims depend upon one or more of the independent claims. No claims have been allowed.

(iv). STATUS OF AMENDMENTS

Appellants have not submitted any amendment pursuant to 37 C.F.R. § 1.116 or in the reply to the July 25, 2006 Final Office Action (hereinafter "Office Action"), from which this appeal is being sought. Appellants canceled claims 14-17 without prejudice in Appellant's Appeal Brief.

(v). SUMMARY OF CLAIMED SUBJECT MATTER

Appellants' independent claim 1 includes, but is not limited to, a mattress 100 having a head end 108, a foot end 110, a first side 106, a second side 106, and a center region 102 that traverses the mattress from the head end 108 to the foot end 110. The center region 102 may include one or more materials other than a single air bladder that mitigate the emergence of a center ridge over repeated uses of the mattress. The center region 102 may have a width of between about two inches and about twelve inches. Fig. 1 of the present application illustrates an exemplary embodiment of claim 1.

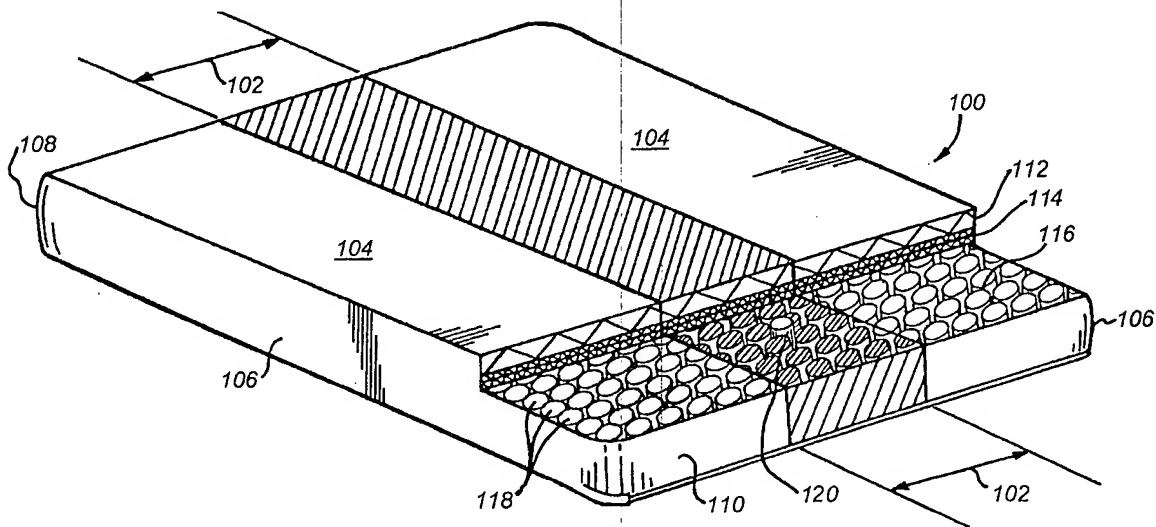


Fig. 1 of the Present Application

Independent claim 18 recites subject matter similar to that of claim 1, including that the center region has one or more materials other than a single air bladder having a firmness reduced or increased relative to other regions of the mattress.

Independent claim 20 recites subject matter similar to that of claim 1, including a compensation means other than adjusting the inflation of a single air bladder for reducing or increasing a firmness of the center region relative to other regions of the mattress.

Independent claim 21 recites a method for manufacturing a mattress, including constructing a first region and a second region of one or more materials having a first firmness wherein the first region and the second region are configured to provide a sleeping surface to one or more users of the mattress. Then, constructing a center region between the first region and the second region wherein the center region is constructed of one or more materials other than a single air bladder that together have a second firmness different than the first firmness. The center region may also have a width of between about two inches and about twelve inches.

Independent claim 23 recites subject matter similar to that of claim 1, including that the center region has one or more adjustable members other than a single air bladder which is controllable to adjust the center region in response to an emerging center ridge.

Support in the specification for claims 1, 18, 20, 21, and 23 is found at least in the locations indicated in the following tables:

Claim 1	The Specification
A mattress comprising: a head end;	See, e.g., Fig. 1, "head end 108" Pg. 5-6, par. 0017 and 0019 Pg. 2, par. 0006-0008
a foot end;	See, e.g., Fig. 1, "foot end 110" Pg. 5-6, par. 0017 and 0019 Pg. 2, par. 0006-0008
a first side and a second side; and	See, e.g., Fig. 1, "sides 106"

	Pg. 5-6, par. 0017 and 0019 Pg. 2, par. 0006-0008
a center region traversing the mattress from the head end to the foot end, the center region including one or more materials other than a single air bladder that mitigate the emergence of a center ridge over repeated uses of the mattress, the center region having a width of between about two inches and about twelve inches.	See, e.g., Fig.1, "center region 102" Pg. 5-6, par. 0017 and 11019 Pg. 2, par. 0006-0008 Originally filed claim 1 includes "one or more materials." Pg. 7, par. 0022 "any material or materials" include "open coils, pocket coils, a monolithic or composite foam (such as viscoelastic foam), fluids or gasses in one or more bladders, and so forth, or any combination of these."

Claim 18	The Specification
A mattress comprising: a head end;	See, e.g., Fig. 1, "head end 108" Pg. 5-6, par. 0017 and 0019 Pg. 2, par. 0006-0008
a foot end;	See, e.g., Fig. 1, "foot end 110" Pg. 5-6, par. 0017 and 0019 Pg. 2, par. 0006-0008
a first side and a second side;	See, e.g., Fig. 1, "sides 106" Pg. 5-6, par. 0017 and 0019 Pg. 2, par. 0006-0008
a center region traversing the mattress from the head end to the foot end, the center region including one or more materials other than a single air bladder having a firmness reduced or increased relative to other regions of the mattress, the center region having a width of between about two inches	See, e.g., Fig.1, "center region 102" Pg. 8, par. 0023, "stiffen" or "reduce stiffness." Pg. 5-6, par. 0017 and 11019 Pg. 2, par. 0006-0008 Originally filed claim 18 includes "one or

and about twelve inches.	<p>more materials."</p> <p>Pg. 7, par. 0022 "any material or materials" include "open coils, pocket coils, a monolithic or composite foam (such as viscoelastic foam), fluids or gasses in one or more bladders, and so forth, or any combination of these."</p>
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Claim 20	The Specification
A mattress comprising: a head end;	<p>See, e.g., Fig. 1, "head end 108"</p> <p>Pg. 5-6, par. 0017 and 0019</p> <p>Pg. 2, par. 0006-0008</p>
a foot end;	<p>See, e.g., Fig. 1, "foot end 110"</p> <p>Pg. 5-6, par. 0017 and 0019</p> <p>Pg. 2, par. 0006-0008</p>
a first side and a second side;	<p>See, e.g., Fig. 1, "sides 106"</p> <p>Pg. 5-6, par. 0017 and 0019</p> <p>Pg. 2, par. 0006-0008</p>
a center region separated from the first side and the second side and traversing the mattress from the head end to the foot end, the center region having a width of between about two inches and about twelve inches; and	<p>See, e.g., Fig. 1, "center region 102"</p> <p>Pg. 5-6, par. 0017 and 11019</p> <p>Pg. 2, par. 0006-0008</p>
a compensation means other than adjusting the inflation of a single air bladder for reducing or increasing a firmness of the center region relative to other regions of the mattress.	<p>Pg. 8, par. 0023, "controllably stiffen ...or reduce the stiffness."</p> <p>Pg. 7, par. 0022 "any material or materials" include "open coils, pocket coils, a monolithic or composite foam (such as viscoelastic foam), fluids or gasses in one or more bladders, and so forth, or any combination of these."</p>

Claim 21	The Specification
<p>A method for manufacturing a mattress, the method comprising:</p> <p>constructing a first region and a second region of one or more materials having a first firmness, the first region and the second region being configured to provide a sleeping surface to one or more users of the mattress;</p>	<p>See, e.g., Fig. 1</p> <p>Pg. 4, par. 0013</p>
<p>constructing a center region between the first region and the second region, the center region being constructed of one or more materials other than a single air bladder that together have a second firmness different than the first firmness, the center region having a width of between about two inches and about twelve inches.</p>	<p>See, e.g., Fig. 1</p> <p>Pg. 4, par. 0013</p> <p>Pg. 7, par. 0022 "any material or materials" include "open coils, pocket coils, a monolithic or composite foam (such as viscoelastic foam), fluids or gasses in one or more bladders, and so forth, or any combination of these."</p>

Claim 23	The Specification
<p>A mattress comprising:</p> <p>a head end;</p>	<p>See, e.g., Fig. 1, "head end 108"</p> <p>Pg. 5-6, par. 0017 and 0019</p> <p>Pg. 2, par. 0006-0008</p>
<p>a foot end;</p>	<p>See, e.g., Fig. 1, "foot end 110"</p> <p>Pg. 5-6, par. 0017 and 0019</p> <p>Pg. 2, par. 0006-0008</p>
<p>a first side and a second side;</p>	<p>See, e.g., Fig. 1, "sides 106"</p> <p>Pg. 5-6, par. 0017 and 0019</p> <p>Pg. 2, par. 0006-0008</p>
<p>a center region traversing the mattress from the head end to the foot end, the center region including one or more adjustable members other</p>	<p>See, e.g., Fig.1, "center region 102"</p> <p>Pg. 5-6, par. 0017 and 11019</p> <p>Pg. 2, par. 0006-0008</p>

<p>than a single air bladder controllable to adjust the center region in response to an emerging center ridge, the center region having a width of between about two inches and about twelve inches.</p>	<p>Pg. 8, par. 0023, "one or more adjustable members 120" and "controllably stiffen ...or reduce the stiffness." Pg. 7, par. 0022 "any material or materials" include "open coils, pocket coils, a monolithic or composite foam (such as viscoelastic foam), fluids or gasses in one or more bladders, and so forth, or any combination of these."</p>
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(vi). GROUND OF REJECTION TO BE REVIEWED ON APPEAL

The following grounds of rejection are to be reviewed on this appeal:

Whether claims 1, 2, 4, 6-8, 18-22, 24-27, and 29 stand rejected under 35 U.S.C. 103(a) over the combination of U.S. Patent No. 5,579,549 ("Selman et al.") or U.S. Patent No. 6,041,459 ("Nunez et al.") in view of U.S. Patent No. 5,077,849 ("Farley '849) or U.S. Patent No. 6,003,179 ("Farley '179").

Whether claims 9-11 stand rejected under 35 U.S.C. 103(a) over the combination of U.S. Patent No. 5,579,549 ("Selman et al.") or U.S. Patent No. 6,041,459 ("Nunez et al.") in view of U.S. Patent No. 5,077,849 ("Farley '849) or U.S. Patent No. 6,003,179 ("Farley '179") in further view of U.S. Patent No. 4,092,749 ("Klancnik").

Whether claims 9, 12, and 13 stand rejected under 35 U.S.C. 103(a) over the combination of U.S. Patent No. 5,579,549 ("Selman et al.") or U.S. Patent No. 6,041,459 ("Nunez et al.") in view of U.S. Patent No. 5,077,849 ("Farley '849) or U.S. Patent No. 6,003,179 ("Farley '179") in further view of U.S. Patent No. 4,086,675 ("Talbert et al.") or U.S. Patent No. 5,537,699 ("Bonaddio et al.") or U.S. Patent No. 3,516,901 ("Fultz et al.").

(vii). ARGUMENT

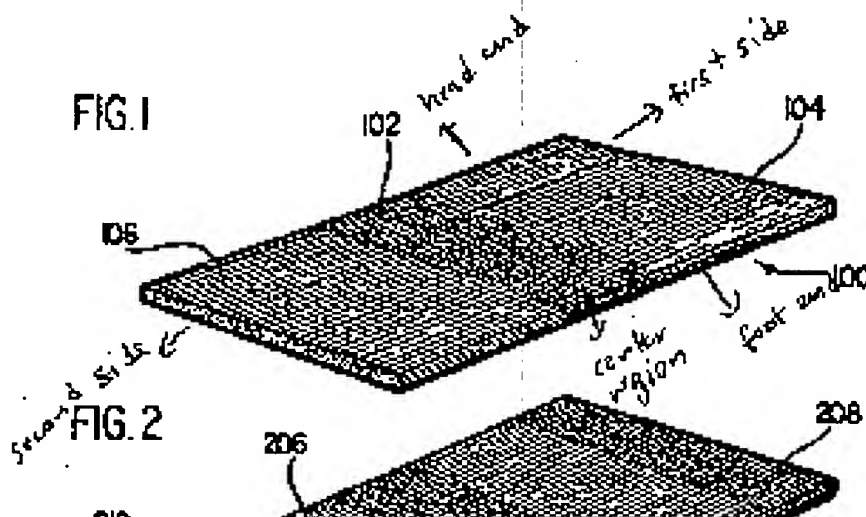
A. The Rejection of Claims 1, 2, 4, 6-8, 18-22, 24-27 and 29 under 35 U.S.C. §103(a) over Selman et al. or Nunez et al. in view of Farley '849 or Farley '179

Claims 1, 2, 4, 6-8, 18-22, 24-27, and 29 remain finally rejected under 35 U.S.C. 103(a) over the combination of U.S. Patent No. 5,579,549 ("Selman et al.") or U.S. Patent No. 6,041,459 ("Nunez et al.") in view of U.S. Patent No. 5,077,849 ("Farley '849") or U.S. Patent No. 6,003,179 ("Farley '179"). Appellants respectfully traverse this rejection and request that it be overturned for at least the reasons set forth below.

The primary issue of contention between the Applicants and the Examiner, from the Applicants' perspective, is the meaning and application of the "Examiner's Interpretation" that was first asserted in the Office Action mailed on April 14, 2005 where the Examiner stated:

Selman et al. and Nunez et al. both disclose a mattress comprising a head end, a foot end, a first side and a second side (see attached marked up drawings) and a center region (102, 44) traversing the mattress from the head end to the foot end... (See April 14, 2005 Office Action, p. 3, Sect. 4)

The Examiner attached marked up drawings (marked up by the Examiner himself) of Fig. 1 of Selman et al. and Fig. 2 of Nunez et al. to the Office Action. Below is copy of the marked up Fig. 1 of Selman et al. showing the drawing modifications made by the Examiner.



Marked-up Fig. 1 of Selman et al. as Modified by the Examiner

The Applicants responded that the Examiner's modification of Selman et al. and Nunez et al. was "contrary" to their respective descriptions (See Applicants' June 18, 2005 Amendment, pp. 8-9). In response to the Applicants' assertion that the Examiner's Interpretation was contrary to the descriptions in Selman et al. and Nunez et al., the Examiner stated (with respect to Selman et al., Nunez et al., Farley '179, and Farley '849):

It should be noted that there is no structure precluding the examiners interpretation of what is the head portion and the foot portion. For example, if one were to lay transversely on a bed, then the portion of the bed where the users head lies would be considered the head portion and the portion of the bed where the users feet lies would be considered the foot portion. (See October 7, 2005 Office Action, p. 6, Sect. 6).

The Examiner maintains this Examiner's Interpretation in the Examiner's Answer stating:

The examiner clearly is not modifying the structure of Selman et al. by pointing out what is considered as the head end, foot end, first and second sides because the structure is exactly the same. The head end and foot end are clearly determined by how one uses the mattress and so there is no modification to the structure by merely labeling one side the head end and opposite to that the foot end. (See Examiner's Answer, p. 14).

The meaning and application of the "Examiner's Interpretation" is unclear. More particularly, it is not clear whether the Examiner's Interpretation refers to claim interpretation of the pending claims or whether the Examiner's Interpretation refers to a reading of the descriptions for Selman et al., Nunez et al., Farley '179, and Farley '849. Regardless of the Examiner's meaning and application, the Examiner's Interpretation is improper and contrary to the MPEP and Federal Law.

1. The Examiner's Interpretation, if intended to be claim interpretation of the pending claims, is improper because the claim interpretation is contrary MPEP § 2111 and Federal Law

According to MPEP§ 2111:

During patent examination, the pending claims must be "given their broadest reasonable interpretation consistent with the specification." The Federal Circuit's *en banc* decision in *Phillips v. AWH Corp.*, 415 F.3d 1303, 75 USPQ2d 1321 (Fed. Cir. 2005) expressly recognized that the USPTO employs the "broadest reasonable interpretation" standard: The Patent and Trademark Office ("PTO") determines the scope of claims in patent applications not solely on the basis of the claim language, but upon giving claims their broadest reasonable construction "in light of the specification as it would be interpreted by one of ordinary skill in the art." *In re Am. Acad. of Sci. Tech. Ctr.*, 367 F.3d 1359, 1364[, 70 USPQ2d 1827] (Fed. Cir. 2004). Indeed, the rules of the PTO require that application claims must "conform to the invention as set forth in the remainder of the specification and the terms and phrases used in the claims must find clear support or antecedent basis in the description so that the meaning of the terms in the claims may be ascertainable by reference to the description." 37 CFR 1.75(d)(1). 415 F.3d at 1316, 75 USPQ2d at 1329.

In *Phillips*, the CAFC also stated:

We have made clear, moreover, that the ordinary and customary meaning of a claim term is the meaning that the term would have to a person of ordinary skill in the art in question at the time of the invention, i.e., as of the effective filing date of the patent application. (See *Phillips* at 1313).

The Application, as originally filed, describes and shows (below) a mattress structure where "the center region 102 extends from the head end 108 to the foot end 110 of the mattress 100" (See Application, Fig. 1 and Para. 0019). Such description of a mattress structure with a head end 108 and foot end 110 is also based on the ordinary and customary meaning of a head end and foot end that one of ordinary skill in the art would recognize at the time of the Application.

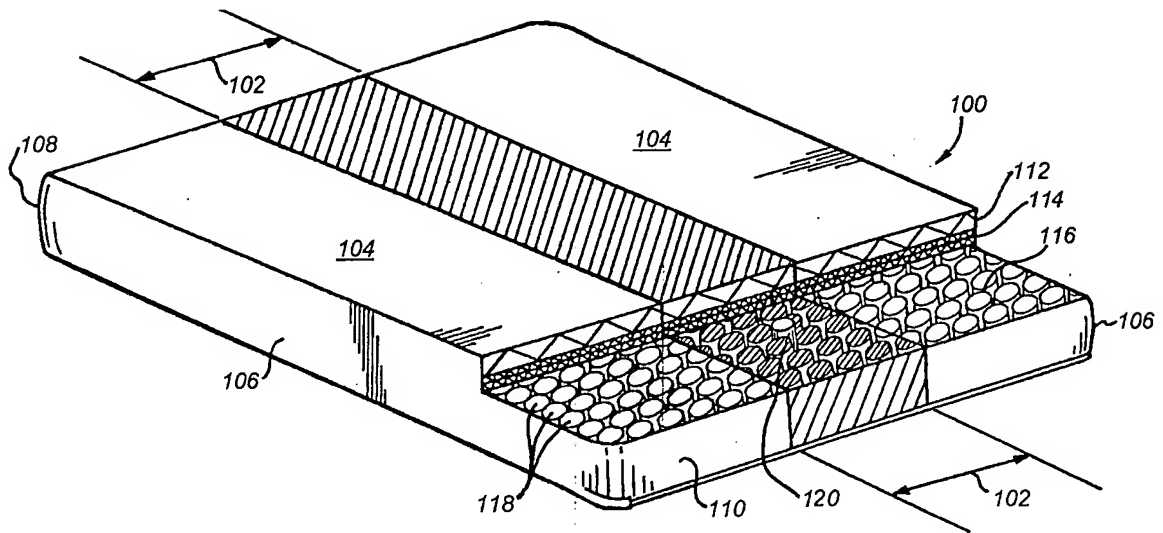


Fig. 1 of the Present Application

The Examiner asserts that "the portion of the bed where the users head lies would be considered the head portion and the portion of the bed where the users feet lies would be considered the foot portion." However, there is no support in the Application specification for such an Examiner Interpretation. Nowhere in the specification is there a definition or suggestion that the head end and foot end are based on how or where a user lies on a mattress. In fact, the only support for the Examiner's alleged interpretation is the Examiner's own Marked-up Fig. 1 that is provided in the April 14, 2005 Office Action. Also, the Examiner's Interpretation indicates that a "head end" or "foot end" of, for example, Claim 1 can also be a "side" of a mattress which is contrary to the ordinary and customary meaning of a head end and foot end of a mattress.

The Examiner's assertion that "there is no structure precluding the examiners interpretation of what is the head portion and the foot portion" (See October 7, 2005 Office Action, p. 6, Sect. 6) is contrary to Fig. 1 of the Application which clearly shows a mattress structure have a head end and foot end. There is simply no intrinsic evidence in the Application specification to support the Examiner's Interpretation. Given there is no intrinsic support for the Examiner's Interpretation, the Examiner has never provided any extrinsic evidence to support the Examiner's Interpretation that the "the portion of the bed where the users head lies would be

considered the head portion and the portion of the bed where the users feet lies would be considered the foot portion."

Thus, the Examiner's Interpretation with respect to, for example, Claim 1 is not "consistent with the specification" or the "ordinary and customary meaning" of the head end and foot end (See Application, Claim 1). Yet, the Examiner has made no attempt to provide any extrinsic evidence for his interpretation. In fact, the Examiner's Interpretation effectively renders the elements "head end" and "foot end" of Claim 1 meaningless. In other words, the Examiner's Interpretation effectively removes (reads out) the "head end" and "foot end" limitations from Claim 1.

While the Examiner must apply the "broadest reasonable interpretation," such interpretation must also be consistent with the specification. Clearly, the Examiner's Interpretation of the "head end" and "foot end," and a "center region" extending between these ends, as recited in independent Claims 1, 18, and 20, is not consistent with the Application specification. A more reasonable claim interpretation of, for example, Claim 1, in light the specification as it would be interpreted by one of ordinary skill, simply includes the ordinary and customary meaning of a "head end" and "foot end" that is consistent with the disclosed structure of the mattress as shown in Fig. 1.

For an office action to establish a prima facie case of obviousness against a claim, the prior art reference or references used to form the rejection must, either alone or in combination, teach or suggest all the claim limitations. MPEP § 2143.

By discarding the Examiner's Interpretation and applying the Applicants reasonable claim interpretation, it is clear that neither Selman et al., Nunez et al., Farley '179, nor Farley '849 teach or suggest "a center region traversing the mattress from the head end to the foot end" as recited in Claims 1, 18, and 20.

Because Selman et al., Nunez et al., Farley '849, and Farley '179, either alone or in combination, fail to teach or suggest "a center region traversing the mattress from the head end

to the foot end," the combination of Selman et al. or Nunez et al. in view of Farley '849 or Farley '179 fails to teach or suggest all of the elements of independent Claims 1, 18, and 20. Therefore, there is no prima facie case of obviousness with respect to the combination of Selman et al. or Nunez et al. in view of Farley '849 or Farley '179.

For at least these reasons, Appellants respectfully submit that the Board should reverse the rejection of independent claims 1, 18, and 20 under 35 U.S.C. § 103(a). Because claims 2, 4, 6-8, 24-27, and 29 depend from, and are limited by, claims 1, 18, and 20, the Board should reverse the §103 rejection of these claims as well.

With respect to independent claims 1, 18, 20, and 21, Selman et al., Nunez et al., Farley '179, and Farley '849 fail to teach or suggest the "center region having a width of between about two inches and about twelve inches." For this reason also, there is no prima facie case with respect to independent claims 1, 18, 20, and 21. For at least this reason, Appellants respectfully submit that the Board should reverse the rejection of independent claims 1, 18, 20, and 21 under 35 U.S.C. § 103(a).

2. The Examiner's Interpretation, if intended to be an interpretation of the prior art references, is improper because it is not based on a fair reading of the prior art according to Federal Law

An interpretation of prior art references requires a "fair reading of these references as a whole." (See *In Re Pieter Kramer*, 18 U.S.P.Q.2D (BNA) 1415).

In *In Re Pieter Kramer*, the CAFC has also stated:

It is true that it is the *teachings*, not the actual physical embodiments, of references that are considered in making an obviousness determination under 35 USC 103. (See *In Re Pieter Kramer* at 1415).

As discussed previously, the Examiner's Interpretation of the head end and foot of a mattress includes the following definition:

...the portion of the bed where the users head lies would be considered the head portion and the portion of the bed where the users feet lies would be considered the foot portion. (See October 7, 2005 Office Action, p. 6, Sect. 6).

Like the Application specification, there is no support, teaching, or suggestion in any one, or combination, of Selman et al., Nunez et al., Farley '179, and Farley '849 for the Examiner's Interpretation. Therefore, the Examiner's Interpretation is not based on a "fair reading of these references as a whole." A fair reading of these references is more likely that these references show mattress and/or padding structures having clearly defined head ends, foot ends, and sides.

The Examiner has insisted, however, that "there is no structure precluding the examiners interpretation of what is the head portion and the foot portion" (See October 7, 2005 Office Action, p. 6, Sect. 6). The Examiner has also stated "there is no modification to the structure by merely labeling one side the head end and opposite to that the foot end." (See Examiner's Answer, p. 14). The Examiner fails to appreciate "that it is the teachings, not the actual physical embodiments, of references that are considered in making an obviousness determination under 35 USC 103" (See *In Re Pieter Kramer* at 1415). In other words, the teachings of Selman et al., Nunez et al., Farley '179 and Farley '849 have clearly defined head and foot ends. The fact that a user may lay from side to side across a mattress is not a teaching of Selman et al., Nunez et al., Farley '179, or Farley '849.

Because the Examiner's Interpretation is not based on a fair reading of Selman et al., Nunez et al., Farley '179, and Farley '849, these references, either alone or in combination, cannot teach or suggest "a center region traversing the mattress from the head end to the foot end." Thus, the combination of Selman et al. or Nunez et al. in view of Farley '849 or Farley '179 fails to teach or suggest all of the elements of independent Claims 1, 18, and 20. Therefore, there is no prima facie case of obviousness with respect to the combination of Selman et al. or Nunez et al. in view of Farley '849 or Farley '179.

For at least these reasons, Appellants respectfully submit that the Board should reverse the rejection of independent claims 1, 18, and 20 under 35 U.S.C. § 103(a). Because

claims 2, 4, 6-8, 24-27, and 29 depend from, and are limited by, claims 1, 18, and 20, the Board should reverse the §103 rejection of these claims as well.

3. The Examiner's Interpretation is unclear and does not properly communicate the basis for a rejection according to MPEP § 706.02(j)

According to the MPEP:

It is important for an examiner to properly communicate the basis for a rejection so that the issues can be identified early and the applicant can be given fair opportunity to reply. Furthermore, if an initially rejected application issues as a patent, the rationale behind an earlier rejection may be important in interpreting the scope of the patent claims. Since issued patents are presumed valid (35 U.S.C. 282) and constitute a property right (35 U.S.C. 261), the written record must be clear as to the basis for the grant. Since patent examiners cannot normally be compelled to testify in legal proceedings regarding their mental processes (see MPEP § 1701.01), it is important that the written record clearly explain the rationale for decisions made during prosecution of the application. (See MPEP § 2141).

As discussed above, it is unclear whether the Examiner's Interpretation is an interpretation of the Application claims or an interpretation of the prior art references. Also, it is unclear whether the Examiner, if interpreting the Application claims, applied the proper claim interpretation standard. Further, it is unclear whether the Examiner, if interpreting the references, applied a "fair reading" standard.

For at least these reasons, Appellants respectfully submit that the Board should the reverse all rejections of the claims because the Examiner has failed to properly communicate the basis for all current rejections.

4. The Examiner has failed to make a prima facie case of obviousness because the Examiner's Interpretation includes a modification of the prior art references and the Examiner has failed to provide a convincing line of reasoning for such modification

Obviousness is a question of law, based on such facts as the following: "(1) the scope and content of the prior art; (2) the level of ordinary skill in the art at the time of the invention; (3) objective evidence of nonobviousness; and (4) the differences between the prior art and the claimed subject matter." (See *Graham v. John Deere*, 383 U.S. 1, 17-18, 148 USPQ 459 (1966). See also, *In re GPAC Inc.*, 57 F.3d 1573, 1577 (Fed. Cir. 1995) and MPEP § 2141). Objective factors such as commercial success and long-felt need may also be relevant to the determination of obviousness. (See *In re Mayne*, 104 F.3d 1339, 1341 (Fed. Cir. 1997)).

Recently, in *KSR International Co. v. Teleflex Inc. et al.*, 127 U.S. 1727 (2007), the United States Supreme Court rejected the CAFC's "teaching, suggestion, or motivation" (TSM) obviousness test in favor of a less rigid evaluation of obviousness in view of *Graham*. In particular, the Court stated that "Graham provided an expansive and flexible approach to the obviousness question, that is inconsistent with the way the Federal Circuit applied its TSM test here." The Court further stated:

When there is a design need or market pressure to solve a problem and there is a finite number of identified, predictable solutions, a person of ordinary skill in the art has good reason to pursue the known options within his or her technical grasp. If this leads to the anticipated success, it is likely the product not of innovation but of ordinary skill and common sense. (See *KSR International Co. v. Teleflex Inc. et al.*, 127 U.S. 1727, 1740 (2007)).

In *Ex Parte Clapp*, the Board stated:

To support the conclusion that the claimed combination is directed to obvious subject matter, either the references must expressly or impliedly suggest the claimed combination or the examiner must present a convincing line of reasoning as to why the artisan would have found the claimed invention to have been obvious in light to the teaching of the references. (See *Ex Parte Clapp*, 227 U.S.P.Q. (BNA) 972).

In *Ex Parte Clapp*, the Board also stated:

It is to be noted that simplicity and hindsight are not proper for resolving the issue of obviousness. (See *Ex Parte Clapp*, 227 U.S.P.Q. (BNA) 972).

The Examiner's Interpretation includes a modification of Fig. 1 of Selman et al. and Fig. 2 of Nunez et al. where the position of the "head portion" and "foot portion" are

changed to correspond to the sides of the mattress. It is the Examiner alone, not Selman et al., Nunez et al., Farley '179, nor Farley '849, that teaches, suggests, or provides motivation for this modification.

Independent claims 1, 18, 20, and 21 at least address the problem of center ridge formation along the center portion of a mattress between the areas where persons customarily lay on a mattress. Selman et al., Nunez et al., Farley '179 and Farley '849 are not even remotely concerned with addressing this problem. These references are concerned with a completely different issue of providing different support to different portions of a person's body while laying on a mattress.

In view of the completely different problem being solved by the references including Selman et al., Nunez et al., Farley '179, and Farley '849, the Examiner has failed to provide any references that show "there was a design need or market pressure to solve" the center ridge problem. (See KSR at 1740). The Examiner has failed to show that there was "a finite number of identified, predictable solutions" for the center ridge problem and that "a person of ordinary skill in the art has good reason to pursue the known options within his or her technical grasp." (See KSR at 1740). Yet further, the Examiner has failed to provide "a convincing line of reasoning as to why the artisan would have found the claimed invention to have been obvious in light to the teaching of the references. (See Ex Parte Clapp at 972).

In fact, the only line of reasoning presented by the Examiner is that a person, other than the artisan of ordinary skill, may lay from side to side on a mattress. Because the Examiner's line of reasoning and Examiner's Interpretation have no basis in the references, or in the understanding of one of ordinary skill at the time of the application filing, the Examiner's interpretation cannot be considered reasonable or convincing.

Further, the Examiner's Interpretation can only be based on impermissible hindsight reasoning because Selman et al., Nunez et al., Farley '179, and Farley '849 are completely devoid of any motivation, teaching, or suggestion that addresses the center ridge

problem. Again, it is the Examiner himself that modified Fig. 1 of Selman et al. and Fig. 2 of Nunez et al.

The Examiner alleged interpretation, as a modification of Selman et al., Nunez et al., Farley '179, or Farley '849 also renders these references unsatisfactory for there intended purpose of providing a different amount of firmness to different portions of a person's body. The Examiner's Interpretation is essentially the same type of interpretation that the CAFC rejected in *In re Gorden* (See *In re Gorden*, 733 F.2d 900, 221 USPQ 1125 (Fed. Cir. 1984)).

For the foregoing reasons, Appellants respectfully submit that the Board should the reverse the § 103 Rejection of claims 1, 2, 4, 6-8, 18-22, 24-27, and 29.

B. The Rejection of Claims 9-11 under 35 U.S.C. §103(a) over Selman et al. or Nunez et al. in view of Farley '849 or Farley '179 in further view of Klancnik

Claims 9-11 are finally rejected under 35 U.S.C. 103(a) over the combination of Selman et al. or Nunez et al. in view of Farley '849 or Farley '179 in further view of U.S. Patent No. 4,092,749 ("Klancnik"). Appellants respectfully traverse this rejection and request that it be overturned.

Klancik does not provide the elements that are deficient from Selman et al., Nunez et al., Farley '849, or Farley '179 as discussed above where the center region has "a width of between about two inches and about twelve inches." For at least these reasons, Appellants respectfully submit that the Board should reverse the rejection of claims 9-11 under 35 U.S.C. § 103(a).

C. The Rejection of Claims 9, 12, and 13 under 35 U.S.C. §103(a) over Selman et al. or Nunez et al. in view of Farley '849 or Farley '179 in further view of Talbert et al. or Bonaddio et al. or Fultz et al.

Claims 9, 12-13 are finally rejected under 35 U.S.C. 103(a) over the combination of Selman et al. or Nunez et al. in view of Farley '849 or Farley '179 in further view of U.S. Patent No. 4,086,675 ("Talbert et al.") or U.S. Patent No. 5,537,699 ("Bonaddio et al.") or U.S. Patent No. 3,516,901 ("Fultz et al.").

Talbert et al., Bonaddio et al., or Fultz et al., either alone or in combination, do not provide the elements that are deficient from Selman et al., Nunez et al., Farley '849, or Farley '179 as discussed above. Therefore, Appellants respectfully submit that the Board should reverse the rejection of claims 9 and 12-13 under 35 U.S.C. § 103(a).

D. Conclusion

For the reasons given above, along with the reasons provided in the Applicants' Appeal Brief, Pre-Appeal Brief, and Office Action Responses, it is respectfully urged that the final rejection be reversed and that all pending claims be allowed.

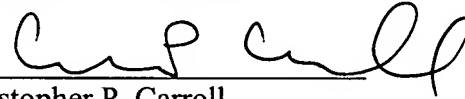
Claims 1, 18, 20, 21, and 23 are patentable over the references of record. Claims 2, 4, 6-13, 19, 22, and 24-29, as dependent claims, are also patentable for at least the reasons that claims 1, 18, 20, and 21 are patentable.

Appellants believe that no fee is required, however, the Commissioner is authorized, if necessary, to withdraw any fees not accounted for from the Deposit Account 18-1945.

If there are any questions after reviewing this paper, the Examiner is invited to contact the undersigned at (617) 951-7000.

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Respectfully submitted,

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(viii). CLAIMS APPENDIX

1. A mattress comprising:

a head end;

a foot end;

a first side and a second side; and

a center region traversing the mattress from the head end to the foot end, the center region including one or more materials other than a single air bladder that mitigate the emergence of a center ridge over repeated uses of the mattress, the center region having a width of between about two inches and about twelve inches.

2. The mattress of claim 1 wherein the center region is separated by an approximately equal distance from the first side and the second side.

3. (Canceled).

4. The mattress of claim 1 wherein the mattress is a king size mattress.

5. (Canceled).

6. The mattress of claim 1 wherein the center region has a firmness reduced or increased relative to other regions of the mattress.

7. The mattress of claim 1 wherein the mattress includes a quilted material over a sleeping surface thereof, the quilted material having a firmness in the center region reduced or increased relative to other regions of the mattress.

8. The mattress of claim 1 wherein the mattress includes an upholstery material over a sleeping surface thereof, the upholstery material having a firmness in the center region reduced or increased relative to other regions of the mattress.

9. The mattress of claim 1 wherein the mattress includes a core, the core having a firmness in the center region reduced or increased relative to other regions of the mattress.
10. The mattress of claim 9 wherein the core includes a plurality of open coil springs.
11. The mattress of claim 9 wherein the core includes a plurality of pocket coil springs.
12. The mattress of claim 9 wherein the core includes foam.
13. The mattress of claim 12 wherein the foam is viscoelastic foam.
- 14-17. (Canceled).
18. A mattress comprising:
 - a head end;
 - a foot end;
 - a first side and a second side;
 - a center region traversing the mattress from the head end to the foot end, the center region including one or more materials other than a single air bladder having a firmness reduced or increased relative to other regions of the mattress, the center region having a width of between about two inches and about twelve inches.
19. The mattress of claim 18 wherein the center region is separated by an equal distance from the first side and the second side.
20. A mattress comprising:
 - a head end;
 - a foot end;
 - a first side and a second side;

a center region separated from the first side and the second side and traversing the mattress from the head end to the foot end, the center region having a width of between about two inches and about twelve inches; and

a compensation means other than adjusting the inflation of a single air bladder for reducing or increasing a firmness of the center region relative to other regions of the mattress.

21. A method for manufacturing a mattress, the method comprising:

constructing a first region and a second region of one or more materials having a first firmness, the first region and the second region being configured to provide a sleeping surface to one or more users of the mattress;

constructing a center region between the first region and the second region, the center region being constructed of one or more materials other than a single air bladder that together have a second firmness different than the first firmness, the center region having a width of between about two inches and about twelve inches.

22. The method of claim 21 wherein the second firmness is reduced or increased relative to the first firmness.

23. A mattress comprising:

a head end;

a foot end;

a first side and a second side;

a center region traversing the mattress from the head end to the foot end, the center region including one or more adjustable members other than a single air bladder controllable to adjust the center region in response to an emerging center ridge, the center region having a width of between about two inches and about twelve inches.

24. The mattress of claim 1 wherein the one or more materials that mitigate the emergence of a center ridge are included in a upper surface of the mattress.

25. The mattress of claim 18 wherein the one or more materials having a firmness reduced or increased relative to other regions of the mattress are included in a upper surface of the mattress.

26. The mattress of claim 20 wherein the compensation means of the center region is included in a upper surface of the mattress.

27. The method of claim 21 wherein the one or more materials are included in a upper surface of the mattress.

28. The mattress of claim 23 wherein the one or more adjustable members are included in a upper surface of the mattress.

29. The mattress of claim 1 wherein the mattress is at least the size of a queen size mattress.

(ix). EVIDENCE APPENDIX

None.

- (x). RELATED PROCEEDINGS APPENDIX
None.